Supreme Court, U. S.
FILED
MAY 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____ 1975

NO. 74-1431

ARTHUR COLEMAN MILLS,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
1. The decision of the U. S. Court of Appeals for the Fifth Circuit affirming Petitioner's conviction does not do substantial justice in this cause since it runs contrary to the whole theory of Anglo-American Jurisprudence regarding illegal searches and seizures in derogation of Petitioner's constitutional rights granted him under the Fourth Amendment to the United States Constitution.	5
Conclusion	14
Appendix A—Indictment	15
Appendix B—Motion to Suppress Evidence	16
Appendix C—Government's Answer to Petitioner's Motion	18
Appendix D—Order That Motion to Suppress Evidence Will be Carried With Case	19
Appendix E—Defendant's Original Motion For a New Trial	20
Appendix F—Judgment and Commitment	22
Appendix G—Government's Answer to Defendant's Original Motion For a New Trial	24
Appendix H—Order Denying Motion For New Trial	26
Appendix I—Notice of Appeal to the Fifth Circuit Court of Appeals	28
Appendix J—Order Granting Extension For Filing of Appellee's Brief	29
Appendix K—Order Affirming Conviction	30
Appendix L—Appellant's Motion For Rehearing	32
Appendix M—Denial of Motion For Rehearing	38

	Page
Appendix N—Stay of Mandate Pending Application For Writ of Certiorari to the Supreme Court of the United States	39
Appendix O—Order Granting Stay of Mandate	41
Appendix P—Application to Extend Stay of Mandate Pending Application For Writ of Certiorari to the Supreme Court of the United States	43
Appendix Q—Order Granting Extension of Stay of Mandate	46

TABLE OF AUTHORITIES

CASES

	Page
Jack v. United States (Calif. 1967) 387 F.2d 471, cert. refused 88 S.Ct. 2299, 392 U.S. 934	9
Munoz v. United States (Calif. 1963) 325 F.2d 23	9
United States v. Sims (D.C. Md. 1964) 234 F. Supp. 251	9
United States v. Watson (D.C. 1969) 307 F. Supp. 173	9, 10
United States v. Mullin, 349 F.2d 295	9, 10
United States v. Lonabaugh, decided December 17, 1973 (5th Cir)	12

UNITED STATES STATUTES

21 U.S.C. 841(a)(1)	1, 3
28 U.S.C. 1254(1)	2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

Petitioner, ARTHUR COLEMAN MILLS, respectfully prays that a Writ of Certiorari issue to review the final opinion and judgment entered in this cause on December 3, 1974 (Motion for Rehearing denied March 4, 1975) by the United States Court of Appeals for the Fifth Circuit, which affirmed Petitioner's conviction for the possession of marihuana in violation of Title 21, United States Code, Sec. 841(a)(1).

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the conviction of Petitioner in the United States District Court for the Southern District of Texas, Houston Division, a copy of which judgment is attached hereto as Appendix "A".

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit affirming the conviction of Petitioner herein was filed on December 3, 1974 and the Motion for Rehearing was denied on March 4, 1975. This Petition for the Writ of Certiorari was filed within the period of extension for filing same granted by the United States Court of Appeals for the Fifth Circuit, which granted Petitioner additional time until May 18, 1975 to file same. The jurisdiction of this court was invoked pursuant to Title 28 United States Code 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1—Whether the evidence obtained under a duly obtained search warrant was properly admissible by the trial court, in view of Petitioner's Motion to Suppress same, since the officers executing such warrant did so in an improper manner?

2—Whether, admitting that the issuance of the search warrant was legal and proper, there exists the requirement that the officers executing a search warrant do so in a proper and legal manner?

3—Whether the prohibition of the 4th Amendment to the United States Constitution against improper searches

and seizures was violated by the United States marshalls executing the warrant, by breaking the lock to the premises while Petitioner was not present in person?

4—Whether or not the prohibition against illegal searches and seizures contained in the Fourth Amendment to the United States Constitution applies only to actual "residences" as opposed to premises which could be temporary residences or merely storehouses?

5—Whether or not outward appearances of a structure determine the classification of same as a "residence"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's Federal constitutional claim is grounded on the Fourth Amendment to the United States Constitution. The judgment herein challenged, alleges violations of Title 21 United States Code, Sec. 841(a)(1).

STATEMENT OF THE CASE

Petitioner was filed on and duly charged by indictment dated October 23, 1973, that he had on or about the 26th of July, 1973, within the Houston Division of the Southern District of Texas and within the jurisdiction of the United States District Court, unlawfully, knowingly and intentionally, had possession with the intent to distribute a controlled substance, under Schedule 1 of the Controlled Substances Act, to-wit: approximately fifty-five (55) kilograms of Marihuana (Cannabis Sativa) in violation of Title 21 United States Code, Section 841(a)(1) (Appendix A).

Petitioner pleaded not guilty in his arraignment before the United States Magistrate on December 10, 1973 and filed his Motion to Suppress Evidence (Appendix B). The Government filed its answer to his Motion to Suppress (Appendix C). Both the Motion to Suppress and the Government's answer thereto were carried along with the case under the Court's order dated January 22, 1974 (Appendix D).

Petitioner filed a Waiver of Jury Trial on April 9, 1974 (Tr. 97), which was duly approved by the Trial Court.

Trial began on April 11, 1974 and was concluded on April 12th, when the Court overruled Petitioner's Motion to Suppress. Petitioner then filed his memorandum of authorities. On the 12th the Court found Petitioner guilty of the offense charged and the Hon. Carl O. Bue, Jr., sentenced him to a prison term of three (3) years and an additional parole term of three (3) years under supervision (Appendix E).

Petitioner filed his Original Motion for a New Trial (Appendix F), on May 10, 1974 and the Government filed its answer to same on the 24th of May (Appendix G). The Court denied Petitioner's Motion on June 7, 1974 (Appendix H) and Petitioner filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on June 20, 1974 (Appendix I).

This appeal was granted on July 11, 1974 and the record and briefs was duly filed with the Fifth Circuit Court on the 29th of July, 1974. (Appendix J)

The United States Court of Appeals for the Fifth Circuit placed this cause on the summary docket calendar and thus Petitioner was deprived of his right to present

an oral argument. On December 3, 1974, the conviction was affirmed by the Fifth Circuit. (Appendix K) Petitioner duly filed a Motion for a Rehearing with the Court, (Appendix L) but it was denied (Appendix M) by the Fifth Circuit Court on March 4, 1975 and Petitioner gave notice of his intention to file for this Writ of Certiorari (Appendix N O P) to this honorable Court and the mandate was stayed after Petitioner's Application to extend stay of mandate until May 18, 1975 finally. (Appendix Q)

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit affirming Petitioner's conviction fails to do substantial justice in this cause in view of the whole history of Anglo-American jurisprudence, the basis for the Fourth Amendment to the United States Constitution, the decisions of the Courts of the United States on this question and the theory that laws permitting searches and seizures are to be strictly construed requiring strict compliance with the letter of the law.

The facts of this case are simple and clear. Petitioner made no effort to dispute them. The Government did have a valid search warrant. They did discover the contraband material as alleged. The amount is not and was not in issue, but Petitioner claims, and he things rightly, that the search and seizure was made illegally and that the evidence so seized should not have been admitted since the seizure was improper. Petitioner, probably like every person convicted, makes the claim that his right under the Fourth Amendment to the United States Constitution has been violated. However, Petitioner feels that his claim has merit in this case.

Let us examine the question here presented by Petitioner. It is an important one for it seeks to have a determination of this Honorable Court setting out with certainty what is the proper procedure for the execution of a search warrant, admittedly properly issued. Petitioner contends that, when Government officers have a search warrant to execute, they must not violate his constitutional rights. Every Court in this land would agree with this position, but the Government would probably insist that the execution was proper and Petitioner thinks otherwise.

Is there any merit to Petitioner's position? Apparently this is a matter of first impression, for Petitioner was unable to find a case directly inpoint and the Government attorney in arguing this matter before the Trial Court (SF 86) admitted that neither he nor his briefing counsel could find any case which justified the "breaking" into a warehouse out of the presence of Petitioner. Petitioner claims that his presence was necessary and the decisions under 18 U.S.C.A. Sec. 3109 seem to support his contention.

The Government claims that because the search warrant was properly issued their agents were within their legal rights and the means of its execution was totally immaterial. The end justifies the means seems to be the entire basis of this contention. It begs the question, which is not one of whether the search warrant was legal, but whether its execution was proper. This is the sole question. Petitioner contended then, and still does, that even with a proper search warrant, its execution must conform to the laws' requirements in every detail.

The history of the question of illegal searches and seizures is an interesting one and goes back beyond our

Constitution and the establishment of our government. Petitioner could cite chapter and verse to prove this point, but he is sure that this Honorable Court would take judicial notice of same. Ours is a government of laws. In Old England in the time of King John, the king thought that he was above the law. He had his comeuppance from the barons of the land and was forced to grant the Magna Charter which set forth the principal that there were certain inalienable rights belonging to the governed and that there were legal restrictions on the power of the governor. The facts of history cannot be ignored for they are indelibly etched into our fabric of life by the blood and sacrifices of thousands of men who preceded us.

As time moved on, the principles underlying the theory we have heard quoted by numerous patriotic orators, to-wit: "A man's home is his castle." Our War of Independence, whose bicentennial we celebrate next year, declared our freedom from the tyranny of King George III and eventually led to the adoption of the Constitution of the United States of America. Petitioner need not remind this Court that it was only adopted after the inclusion of the Bill of Rights at the insistance of Thomas Jefferson and others who felt that the first Ten Amendments to the Constitution were necessary to prevent the return of the tyrannical disregard for the rights of the people; rights which, for the purpose of this case, included the prohibition against illegal searches and seizures as set forth in the Fourth Amendment.

Congress had the power, under this Constitution of ours, to pass laws to govern our country. Included in these laws was 18 U.S.C.A. Title 3109 which is the statute

permitting searches and seizures. Being statutory in nature, the rule of strict construction has been placed upon it by the Courts. Since it allowed searches and seizures, it was necessary that certain steps be taken in executing the Warrants allowed to be issued thereunder. All sorts of conditions were set forth which we are not concerned with here except to note that all conditions set forth had to be first met, before a warrant is deemed valid. We are not concerned with these matters as such, since we have admitted that for the purpose of this case that the warrant was valid. However, we are setting out this argument to show that any and all conditions must first be met and for a search and seizure even under a valid warrant, to be proper.

The basis of Petitioner's contention is however, that the government officers failed to comply with all the necessary conditions in the service of the valid warrant. Unfortunately the Trial Court and the Fifth Circuit failed to agree with Petitioner's contention.

Firstly government agents had the premises, where the contraband was found, under surveillance for some time. They obtained a warrant after seeing him enter and leave the premises. They were waiting for him to return and after a wait of several hours they broke the lock and seized the contraband. The agents knew where Petitioner lived, which was just minutes away; they had seen him the day before; and after the entry, they found him at his residence the next morning. They had no fear of his leaving the country. Surely they could have gone first to his house and brought him to the warehouse and then the breaking into the premises would have been legal.

How does Petitioner make the claim that the warehouse premises was a "residence"? Various analagous cases were cited by Petitioner to uphold his contention that the premises in question should have been considered as under the protection of a "residence". See *Jack v. United States* (Calif 1967) 387 F.2d 471, cert. refused 88 S.Ct. 2299, 392 U.S. 934; *Munoz v. United States* (Calif. 1963) 325 F.2d 23; *United States v. Sims* (D.C. Md. 1964) 234 F. Supp. 251; *United States v. Watson* (D.C. 1969) 307 F. Supp. 173; *United States v. Mullin* 349 F.2d 295.

The *Jack Case* held that entrance by a pass key obtained without the tenant's permission constituted a "breaking" and as such must be tested under Federal statutes under which such a "breaking" is permissable in the making of an arrest.

In the *Munoz Case* it was held that to enter defendant's room with a pass key obtained from the room clerk amounted to a "breaking open" of the door within the section requiring that an officer must state his authority and purpose and be refused admission, before he can break open a door to execute a search warrant.

The *Sims Case* held that an arresting officer's entrance into a hotel room using a key furnished by the hotel clerk was a breaking and entry, without prior notice of identity and request for admittance and statement of purpose for which entry is sought, would render arrest illegal unless the failure to give notice is excusable. Notice this court's theory that the fact that Defendant wasn't in the room when the officer broke in is not an excuse for the officer's failure to give notice and the "breaking in" can only be justified when the arresting officer knows or has reason

to believe that Defendant is within and that the officer is denied entrance.

The *Watson Case* held that the arrest warrant does not clothe the police with power to enter an individual's home unless they have reasonable cause to believe that same is occupied.

Thus it can be seen that "breaking in" to premises is only permissable under certain conditions, to-wit;— presence of the defendant and/or his refusal to admit the officer after he states his identity and purpose for seeking entry and refusal. How could the Petitioner refuse entry if he was not present and the officers knew this? Their reason for breaking in at the time was justified only on their lack of manpower and time, though they had spent considerable time in surveillance and they did not allege any exigent circumstances such as fire, flood, explosion, etc. which led to believe that the place would be destroyed and whatever evidence they hoped to find therein would be destroyed along with it. They knew where to find the Defendant and did find him some twelve hours later where he lived and had lived for some time. There was no emergency that required the immediate "breaking in" out of the presence of the Petitioner.

But you ask, admitting that there are prohibitions against the improper service of a warrant and breaking in to premises outside the presence of the defendant, does this apply to a warehouse stall, for there is no showing that same is a "residence" and therefore protected against an improper search and seizure? Petitioner must respectfully call this Honorable Court's attention to the *Mullin Case* cited above. There evidence seized was suppressed, where the officer, such as here armed with a proper warrant calling for the search for untaxed whiskey, broke into a "smokehouse" which was separated from the "residence" by some 75′ by breaking down a locked door. This under the theory that the smokehouse was a "house", even though obviously unfit for human habitation.

Taking all of these cases together and arguing by analogy, it would seem that there is a proper procedure for the execution of legal search warrants; that the use of pass keys constitute a "breaking and entering" when and if the defendant was not present on the premises and that there is no exact measure or standard that determines what is or is not a "residence".

Petitioner could and does argue that a "house" could be a fifty room mansion or a shack without toilet facilities. Not having been inside the broken into premises prior to the break in, how would the officers know that it was not being used as a "residence" by Petitioner. Once having broken in, they could state that it was not a residence and was not being so used, but that is not the criterion as stated by the cases. Prior, not after acquired, knowledge is necessary to overcome the possibility that the premises in question was a "residence" and being so used.

Petitioner's attorney can recall certain impecunious fellow attorneys who slept in their office because they had not the funds to afford a house or a hotel room during the depression. Would officers be privileged to break into this office, which obviously from outward appearances, was not a residence, and seize evidence without the presence of the owner?

The presence of the party to be charged with crime is necessary when a search and seizure is made so as to

preclude the possibility of evidence being planted and the person being framed. This is a good rule and ought not to be ignored as unimportant simply because the warrant was valid and the search was in fact productive of contraband.

All of this is not spelled out in any particular case, but analogies exist and no two cases are alike. The whole theory of Anglo-American jurisprudence is that a man is innocent until proven guilty and to overlook the theory that laws must be strictly construed to protect the citizen against violations of the Fourth Amendment prohibition against illegal searches and seizures is to make a farce of the entire background of our law and heritage.

But says the government, exigencies may exist which excuse the search, with or without a warrant. A recent case decided by the United States District Court for the Southern District of Texas, Houston Division on December 17, 1973 *United States v. Lonabaugh* illustrates how far the prohibition extends against illegal search and seizures and that even emergency situations are strictly scrutinized. There the officers had a tip that defendant and an accomplice were bringing two bags of marihuana to Houston by commercial airliner. After the baggage was checked by Defendant, the officers removed them, and after the accomplice boarded the airliner, defendant was taken to the baggage area. They broke into the baggage without a warrant, found the contraband and arrested the Defendant. This evidence was admitted over Defendant's objection. The Fifth Circuit reversed and remanded the case holding that while exigent circumstances may have warranted the holding of the Defendant, they did not warrant the search and seizure, since they had both the

defendant and the baggage. It could not have been concealed or destroyed and there was plenty of time to get a warrant to search the baggage.

Arguing from this case and comparing it with the case now on appeal, Petitioner was under surveillance for some three days, two before the obtaining of a search warrant. He had been seen at the warehouse stall the day before his arrest; the place had a fence and gate around it and would have been locked for the night and an agent could have been placed to watch the premises. There was no fire, no flood, or any likelihood of the evidence moving away or being destroyed under the surveillance of this agent. The only thing required would have been to make a short 15 minute drive to Petitioner's home and then bringing him there when the place was opened. In fact they arrested him at this home some 12 hours later at his home with his family present. Note they were in no hurry to arrest him for they knew he would be home. Yet the agent cited some silly concept that the warrant was not executable in the dark and besides that there was a shortage of manpower (SF 56) as their exigent circumstances that justified their "breaking in" out of the presence of the Petitioner. Over Petitioner's objection this evidence was admitted by the Trial Court and his Motion to Suppress was denied. Likewise the Fifth Circuit affirmed the conviction and rulings of the Trial Court in its summary docket decision.

Surely this is not consonant with the theory of the law as Petitioner sees it and as an analogy from the cases argued above and cited by Petitioner.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
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Of Counsel:

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CR. NO. 73-H-388

UNITED STATES OF AMERICA
VS.
ARTHUR COLEMAN MILLS

(Filed: October 29, 1973)

INDICTMENT

THE GRAND JURY CHARGES:

That on or about July 26, 1973, within the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one ARTHUR COLEMAN MILLS did unlawfully, knowingly, and intentionally possess with intent to distribute a controlled substance under Schedule I of the Controlled Substances Act, to-wit: approximately fifty-five (55) kilograms of Marihuana (Cannabis Sativa).

(Violation: Title 21, United States Code, Section 841 (a)(1).

A TRUE BILL:

s/ T. S. GASAWAY
Foreman of the Grand Jury

ANTHONY J. P. FARRIS
United States Attorney

By: s/ JOE DOUCETTE
Joe Doucette
Assistant United States Attorney

APPENDIX B

MOTION TO SUPPRESS EVIDENCE

(Number and title omitted)

(Filed: December 28, 1973)

Comes now, ARTHUR COLEMAN MILLS, DEFENDANT in the above styled and numbered cause and files this his Motion to Suppress evidence obtained herein and as grounds therefore, would respectfully show the following:

1. That such evidence was obtained by virtue of an illegal search and seizure in direct contravention and violation of Defendant's rights guaranteed him under the Fourth Amendment to the Constitution of the United States of America.

2. That such evidence was obtained thru illegal entry into warehouse premises belonging to Defendant, in the absence of a valid search warrant and thru use of a key furnished by the operator of such premises and, in the light of these circumstances constituted a breaking and hence an illegal entry into such premises, since Defendant was not present when such illegal entry was made, in direct violation of Defendant's rights guaranteed him under the Fourth Amendment to the Constitution of the United States of America.

3. That other evidence was obtained thru a search and seizure of Defendant's automobile parked outside of Defendant's residence, when Defendant was not present, in further violation of Defendant's rights guaranteed him under the Fourth Amendment to the Constitution of the United States of America.

4. That such evidence was seized without any exigent circumstances justifying the failure to seek and obtain prior to such illegal searches and seizures, since evidence will show that Defendant was apprehended in person within hours after the fruits of said seizure and illegal search had been obtained, all of which was a further violation of Defendant's rights under the Fourth Amendment to the Constitution of the United States of America.

5. That there was ample time to obtain a proper search warrant and execute same, but the seizing officers ignored such proper legal procedures which were readily available to them, in flagrant violation of Defendant's constitutional rights guaranteed him under the Fourth Amendment to the Constitution of the United States of America.

6. That traditional legal practice requires strict compliance with the rules for searches and seizures and any evidence obtained without such strict compliance must be suppressed as a matter of law.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that his Motion to Suppress Evidence be in all things sustained and granted.

Respectfully submitted,

s/ MORRIS BOGDANOW
Morris Bogdanow

s/ MILTON H. MULITZ
Milton H. Mulitz
Attorneys for Defendant,
1305 Texas Professional Tower,
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Houston, 2, Texas.
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APPENDIX C

GOVERNMENT'S ANSWER TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

(Number and title omitted)

(Filed: January 14, 1974)

COMES NOW the United States of America, by and through its United States Attorney, Anthony J. P. Farris, and files this its Answer to defendant's Motion to Suppress Evidence and respectfully requests the Court to deny said Motion for the following reasons, to-wit:

That the seizure of evidence made the substance of case at bar and that it was obtained through a search warrant from United States Magistrate, Southern District of Texas on July 26, 1973.

That the search warrant was issued on sufficient probable cause of Special Agent Dan Wedeman of the Drug Enforcement Administration.

WHEREFORE, Premises Considered, the Government respectfully requests this Honorable Court to deny the defendant's Motion to Suppress.

Respectfully submitted,

ANTHONY J. P. FARRIS
United States Attorney

By s/ JOE DOUCETTE
Joe Doucette
Assistant United States Attorney

APPENDIX D

ORDER THAT MOTION TO SUPPRESS EVIDENCE WILL BE CARRIED WITH CASE

(Number and title omitted)

(Filed: January 22, 1974)

Anthony J. P. Farris, United States Attorney, Joe Doucette, Asst. United States Attorney, Houston, Texas, for plaintiff.

Morris Bogdanow and Milton H. Mulitz, Houston, Texas, for defendant.

Defendant's Motion to Suppress Evidence will be carried with the case and decided at the trial of this matter. Counsel should be prepared to present at that time evidence regarding the issuance or non-issuance of a valid search warrant.

DONE at Houston, Texas, this 22nd day of January, 1974.

s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

. . . oOo . . .

NOTE: Portion of record omitted filed in its original form.

* * * * *

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CR. NO. 73-H-388

UNITED STATES OF AMERICA

VS.

ARTHUR COLEMAN MILLS

DEFENDANT'S ORIGINAL MOTION
FOR A NEW TRIAL

Comes now, ARTHUR COLEMAN MILLS, DEFENDANT in the above styled and numbered cause, and files this his Original Motion for a New Trial, and as grounds therefore, would respectfully show:

1. That the Court erred in admitting, over Defendant's objection thereto, the alleged lease for warehouse space held in the Defendant's name, since government's witness, Mrs. Anita Moorman, did not see him sign said lease, did not see him deliver the executed copy of same and so testified, which was pure hearsay testimony on her part and improperly admitted to show that Defendant had executed the lease and that he was the real person who had control over the contraband stored in said leased premises.

2. That the Court erred in overruling Defendant's Motion to suppress the evidence and Defendant does here and now incorporate said Motion to Suppress and the grounds therein stated as the basis for his New Trial Motion as though same were fully incorporated herein

for the evidence of contraband seized was improperly obtained in flagrant violation of Defendant's rights under the Fourth Amendment to the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that his Motion for New Trial be granted for the reasons above stated.

Respectfully submitted,

s/ MORRIS BOGDANOW
Morris Bogdanow

s/ MILTON H. MULITZ
Milton H. Mulitz
Attorneys for Defendant,
3200 Kirby, Suite 204,
Houston, Texas 77006
521-0246

APPENDIX F

JUDGMENT AND COMMITMENT

(Number and title omitted)

(Filed: May 10, 1974)

On this 29th day of April, 1974 came the attorney for the government and the defendant appeared in person and with counsel, Morrow Bogdanow.

It Is Adjudged that the defendant upon his plea of not guilty, and a finding of guilty, has been convicted of the offense of unlawful possession with intent to distribute 55 Kilograms of Marihuana, in violation of Title 21, United States Code, Section 841(a)(1), as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS, with a special parole term of three (3) years, with supervision.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done at Houston, Texas, this the 10th day of May, 1974.

s/ CARL O. BUE, JR.
United States District Judge

V. BAILEY THOMAS,
Clerk

APPENDIX G

GOVERNMENT'S ANSWER TO DEFENDANT'S ORIGINAL MOTION FOR A NEW TRIAL

(Number and title omitted)

(Filed: May 24, 1974)

COMES NOW the United States of America by and through her Attorney Anthony J. P. Farris and respectfully files this its Answer to Defendant's Original Motion for a New Trial. We submit the following:

The Government respectfully requests the Court to deny the Defendant's Motion for a New Trial for the following reasons, to-wit:

I.

The Defendant alleges that the Court erred in admitting, over the Defendant's objection, copy of a lease signed by Moorman's warehouses and Arthur Coleman Mills, said lease having been introduced by Mrs. Anita Moorman who was a co-owner and manager of said warehouse with her husband at the time said lease agreement was entered into. The Government respectfully submits that Mrs. Moorman was a competent witness to testify as to the lease agreement, she being a person in care, custody, control of the records of said business establishment coupled with her testimony that the said lease agreement entered into evidence, was made at the time reflected thereon and that said lease was a business record made and entered in the regular course of business. It was further established that Mrs. Moorman had seen this

defendant in the leased mini-warehouse on several occasions thereafter, which the Government would submit corroborates the lease itself, ie., that the Defendant was the same party who negotiated the lease at its inception.

The Government respectfully submits that Mrs. Moorman's testimony is a well known exception to the Hearsay Rule, that she was a competent witness and that the evidence was properly admitted, over the Defendant's objection.

II.

The Government respectfully submits that the Court's overruling Defendant's Motion to Suppress the Evidence was proper, that none of the authorities cited by Defendant were authoritative or persuasive, that no where is there any requisite that a Defendant has to be present at the time a search warrant is served and that this Defendant's constitutional rights under the Fourth Amendment were not violated.

WHEREFORE Premises Considered, the Government respectfully submits that the Defendant's Original Motion for a New Trial be overruled.

Respectfully submitted,

ANTHONY J. P. FARRIS
United States Attorney

By s/ JOE DOUCETTE
Joe Doucette
Assistant United States Attorney

APPENDIX H

ORDER DENYING MOTION FOR NEW TRIAL

(Number and title omitted)
(Filed: June 1, 1974)

Before this Court is the motion for a new trial filed on behalf of defendant, Arthur Coleman Mills. Defendant was convicted by this Court on April 12, 1974, of unlawful possession with the intent to distribute 55 kilograms of marihuana in violation of Title 21, U.S.C. §841(a)(1). His motion is premised upon two allegations of error in the trial of this matter:

(1) The Court erred in admitting the warehouse lease allegedly signed by the defendant because the Government's witness who testified to the authenticity of the lease was not present when the defendant signed the document.

(2) The Court erred in denying the defendant's motion to suppress contraband seized from the warehouse allegedly rented by the defendant because the defendant was not present when the search warrant for those premises was executed.

Defendant's first allegation of error is without merit. Any writing made in the regular course of business is admissible, as an exception to the hearsay rule, even though the party authenticating that document was not its maker and has no personal knowledge of the facts contained within the record *See* 28 U.S.C. § 1732; *United States v. Newman,* 468 F.2d 791 (5th Cir. 1972), cert. denied, 411 U.S. 905 (1973). All that is necessary for admissibility is that the record be made in the ordinary course of business and that the person offering the record be capable of attesting to its authenticity. *See e.g., United States v. Martin,* 434 F.2d 275, 279 (5th Cir. 1970). In this case, Anita Moorman, the owner and operator of Moorman Self-Storage Warehouse, testified that lease agreements similar to the one allegedly signed by the defendant, were executed in every instance in which a warehouse was rented. She identified the document offered by the Government as the agreement she had procured from the company files prior to trial. Accordingly, the fact that the witness was not present when the defendant signed the agreement and did not recognize his signature affects only the weight, as opposed to the admissibility, of the lease agreement.

Defendant's second allegation of an illegal search and seizure is without merit. That issue was raised and considered during the trial of this matter. In view of the thorough consideration given the arguments and briefs of counsel at that time, the issue warrants no further consideration at this time. The Court's trial ruling denying the motion to suppress will stand.

Accordingly, defendant's motion for a new trial is denied.

ENTERED at Houston, Texas, this 7th day of June, 1974.

s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

APPENDIX I

NOTICE OF APPEAL TO THE
FIFTH CIRCUIT COURT OF APPEALS

(Number and title omitted)

(Filed: June 20, 1974)

TO THE HONORABLE CARL O. BUE, JR.,
UNITED STATES DISTRICT JUDGE

Comes now, ARTHUR COLEMAN MILLS, Defendant in the above styled and numbered cause, by and thru his attorneys of record, and files this his written Notice of Appeal to the United States 5th Circuit Court of Appeals, sitting in New Orleans, Louisiana, from the judgement of guilty against him by this Honorable Court and the overruling of his Motion for New Trial entered on June 6th, 1974.

Respectfully submitted,

s/ MORRIS BOGDANOW
Morris Bogdanow, Attorney

s/ MILTON H. MULITZ
Milton H. Mulitz, Attorney

3200 Kirby Drive, Suite 204
Houston, Texas 77006
521-0246

APPENDIX J

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2829

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ARTHUR COLEMAN MILLS, Defendant-Appellant.

Appeal From The United States District Court
For The Southern District of Texas

(Filed October 11, 1974)

ORDER:

Pursuant to the motion of Appellee, IT IS ORDERED[1] that the time for filing Appellee's printed brief is extended to and including October 9, 1974.

Edward W. Wadsworth
Clerk of the United States Court
of Appeals for the Fifth Circuit

By /s/ GEORGE G. BAUER, JR.
Deputy Clerk
For The Court—By Direction

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1. The foregoing action is taken pursuant to this Court's policy regarding prompt processing of criminal appeals as set forth in its plan for expediting criminal appeals adopted February 1, 1972.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term 1974

NO. 74-2829
Summary Calendar

D. C. Docket No. CR-73-H-388

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ARTHUR COLEMAN MILLS, Defendant-Appellant.

Appeal From The United States District Court
For The Southern District of Texas

Before WISDOM, GOLDBERG and GEE, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 3, 1974

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2829
Summary Calendar*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

ARTHUR COLEMAN MILLS, Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas

(December 3, 1974)

Before WISDOM, GOLDBERG and GEE, Circuit Judges.
PER CURIAM: AFFIRMED. See Local Rule 21.[1] The district court's denial of the defendant's motions to suppress the evidence and for a new trial was proper. See Fields v. United States, 5 Cir. 1966, 355 F.2d 543.

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX L

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2829

UNITED STATES OF AMERICA, Plaintiff-Appellee

vs.

ARTHUR COLEMAN MILLS, Defendant-Appellant

APPELLANT'S MOTION FOR REHEARING

MORRIS BOGDANOW,
MILTON H. MULITZ, of Counsel
3200 Kirby, Suite 204,
Houston, Texas 77006.
Attorneys for Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2829

UNITED STATES OF AMERICA, Plaintiff-Appellee

vs.

ARTHUR COLEMAN MILLS, Defendant-Appellant

APPELLANT'S MOTION FOR REHEARING

Comes now, ARTHUR COLEMAN MILLS, Appellant herein, by his attorney of record MORRIS BOGDANOW, and files this, his Motion for Rehearing from the Order of this Honorable Court dated December 3rd 1974, and in support thereof avers as follows:

POINT NO. 1: This Honorable Court erred in its affirmance of the decision of the District Court that Defendant's Motion to Suppress the evidence and his Motion for New Trial.

ARGUMENT AND AUTHORITIES THEREUNDER

This Honorable Court based its decision on its holding in the case of *FIELDS VS. U.S.*, (5th Cir.) 1966; 355 F(2) 543. As I view the holding in the case, it stands for the propositions that: A-There was an ample basis for the issuance of a search warrant; B-That the building entered therein housed a large illegal still; and C-Such building was not within the curtilage, being some 300' in length, and being ostensibly designed for the commercial raising of chickens.

Examining this case and comparing it with the case on appeal, we find that both cases involved search war-

rants, both involved searches without the presence of the Defendant and both ostensibly were not what would normally be considered residential premises. I guess that this appears to be ample justification for this Honorable Court's ruling, but, in so ruling, this Honorable Court totally ignores the case cited by Appellant in his original brief on appeal, to-wit: *U. S. VS. MULLIN,* (5th Cir.) 1964; 329 F.2d 295 which held that a search and seizure was illegal when same was made on a smokehouse some 75′ from a farmhouse for which they did have a search warrant incidently.

In the Mullin case, the smokehouse was not connected to the farmhouse itself which was leased to one of the Defendants. By no stretch of the imagination was the smokehouse a "residence", yet this same court stated that the breaking and entry therein and the seizure of illicit liquor, by agents who had a valid warrant was illegal under the 4th Amendment. How was the smokehouse protected as a residence even tho as the agents stated that same, *after entry,* was in their opinion so dilapidated that it was unfit for the storage of meat? Your honors rightfully stated at p. 298 "The critical moment was the appearance of the smokehouse before entry; subsequent observations as to its condition are irrelevant. Cf. *U. S. v. DI RE,* 332 U.S. 581, 595" and on unto the end of your decision in that case. I could not argue more eloquently for my client's rights. However, I am at a loss to place the two decisions side by side and explain them to him.

True that in the instant case, the building in question that the agents broke into by smashing the lock on the door, was uninhabited and found to be uninhabited after they broke in, but such a state of non-occupancy and

non-usability as a residence was discovered only after entry was forced and not before. Sure it could be stated that obviously no one was in for there was a lock on the door that the agents broke, but this was the first time they were in there and they could not and did know if Defendant was or was not using same a residence at any time. It was not apparent from outward appearances, and nothing could have prevented a person from staying there and living therein if he chose. Surely it is not a requisite of a "residence" that same be a palatial castle with every modern convenience and plumbing facility in order that same qualify for immunity from illegal searches and seizures protected by the 4th Amendment to the United States Constitution.

In fact, this attorney recalls numerous instances of impecunious fellow attorneys who have slept in their offices as they were financially unable to maintain both home and office. If any of these men were under suspicion of breaking the law, the breaking and entry into their "office-home", while he was out would be a violation of the 4th Amendment even tho by no outward standard or criteria or appearances alone could this "office-home" be considered a residence and immune from search and seizure while he was out.

The Court's position falls flat when it states by inference that the storage facility of this case was not protected as a "home" when viewed by the standards of the Mullin Case and the further arguments of counsel that a person who uses his office or his workshop as the place where he spends his evenings due to the lack of financial resources to maintain a proper house as his residence is not entitled to the equal protection of the law afforded to a person who is financially able to own a home or a mansion.

The 4th Amendment was designed to apply equally to all men be they rich or poor.

Furthermore, this Court seemingly overlooks and ignores the obviously basic propositions inherent in the history and background of the 4th Amendment to the United States Constitution which Appellant cited in his original brief. It would seem redundant to repeat and reargue his position at this time for I am sure that this Honorable Court is fully cognizant of the historical background of the prohibition against unlawful searches and seizure and I would respectfully ask that it reassess its decision in the light of same.

Specifically, I would commend to this Court that they study *Sabbath v. U.S.* (1968) 391 U.S. 585 wherein the United States Supreme Court reversed and remanded a case on appeal where agents had a legal warrant and entered Defendant's apartment thru an unlocked door without announcing their identity prior to entry.

> At p. 598 they state "The Court of Appeals for the Ninth Circuit ruled that the officers, in affecting entry to petitioner's apartment by opening the closed but unlocked door, did not "break open" the door within the meaning of 18 USCA 3109 and therefore were not required by that statute to make a prior announcement of "Authority and purpose" 380 F.2d 108. We granted certiorari 389 U.S. 1003; 88 S.Ct. 570, 19 L.Ed.2d 598 (1967) to consider the somewhat uncomplicated but nonetheless significant issue of whether the agents' entry was consonant with federal law. We hold that it was not, and therefore reverse".

That case eloquently argues and stands for the proposition that there is a strict limitation on the execution of

even a legal warrant by an officer in order to avoid the prohibition of the 4th Amendment against illegal searches and seizures. I commend this entire case for your further perusal and study.

If the Supreme Court, in an effort to determine what is or is not an illegal search and seizure, can lean over backward and hold that an entry thru an unlocked door or by means of a pass key is improper, how can this Court justify the smashing of a lock as legal and proper solely on the theory that the place outwardly was not a "residence" and therefore unworthy of protection under the 4th Amendment? I have shown above that even a storage stall could be a "residence" a word that is capable of many interpretations and is a term that fits no set pattern or picture.

In view of the foregoing, Appellant respectfully urges this his Motion for a Rehearing of its Order and Judgement affirming the lower court's decision that the evidence seized herein was the result of an illegal search and seizure under the 4th Amendment to the United States Constitution and that the cause be reversed and remanded with instructions that same be dismissed.

Respectfully submitted,
MORRIS BOGDANOW
Attorney for Appellant

Milton H. Mulitz, Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Motion for Rehearing was forwarded to Anthony J.P. Farris, U.S. District Attorney by U.S. Mail, on December 13th, 1974, to P.O. Box 61129 Houston, Texas, 77061.

APPENDIX M

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. S74-2829

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ARTHUR COLEMAN MILLS,
Defendant-Appellant.

(Filed March 4, 1975)

ON PETITION FOR REHEARING

Before WISDOM, GOLDBERG and GEE, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX N

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2829

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

ARTHUR COLEMAN MILLS,
Defendant-Appellant

STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE JUDGES OF SAID COURT:

Comes now, ARTHUR COLEMAN MILLS, Appellant herein, by his attorney of record, MORRIS BOGDANOW, and files this his Motion for a Stay of Mandate, pending an application for a Writ of Certiorari to the Supreme Court of the United States of America, and in support of said Motion would show the following:

That Appellant sincerely feels that there exists a legitimate basis for appeal of this cause to the Supreme Court of the United States of America on the question of whether or not the District Court for the Southern District of Texas, Houston Division improperly denied Appellant's Motion to Suppress evidence obtained even with a proper search warrant, where Appellant was not present in person when entry was gained thru a breaking of the lock of the premises wherein the evidence was found, in view of the history of the Fourth Amendment to the Constitution of the United States and the decisions of the Federal Courts, (District, Circuit and Supreme) and the philosophical basis and theory of such decisions.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that his Motion for a Stay of Mandate pending application for a Writ of Certiorari to the Supreme Court of the United States of America be granted for the reasons stated above.

Respectfully submitted,

Morris Bogdanow,
Attorney for Defendant,
3200 Kirby, Suite 204,
Houston, Texas 77006,
521-0246

APPENDIX O

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2829

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

ARTHUR COLEMAN MILLS,
Defendant-Appellant.

(Filed March 10, 1975)

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including April 3, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the

Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

s/ JOHN WILLIAM WISDOM
United States Circuit Judge

APPENDIX P

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2829

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS.

ARTHUR COLEMAN MILLS,
Defendant-Appellant

APPLICATION TO EXTEND
STAY OF MANDATE PENDING APPLICATION
FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE UNITED STATES

TO THE HONORABLE JUDGES OF SAID COURT:

Comes now, ARTHUR COLEMAN MILLS, Appellant herein, by his attorney of record, MORRIS BOGDANOW, and files this his Motion for an Extension of the Stay of Mandate for an additional period of at least 45 days from April 3, 1975, set by this Honorable Court, pending his application for a Writ of Certiorari to the Supreme Court of the United States of America, and in support of said Motion would show the following:

1. That he has time problems with the preparation of said application due to the fact that his attorney's associate, Milton H. Mulitz, died on January 13, 1975, and he has been hit with multitudinous problems concerning his practice and his estate which, coupled with his own practice, makes it virtually impossible to prepare a proper application for such Writ of Certiorari in the limited time remaining.

2. That Mr. Mulitz's aid and assistance in the past was greatly relied on by this applicant's attorney in all research pertaining to this matter.

3. That, as explained the pressures of handling both practices both in court and in the office, with the multitudinous problems of keeping abreast of Mr. Mulitz's pending and existing matters and explaining the delays to clients who are just learning of his death, have harried appellant's attorney beyond description, so that he feels like the one-armed paperhanger with an itch while located on top of the platform; that it is impossible to engage the services of another attorney to aid in this, for clients demand that someone who is at least knowledgable to handle their affairs and they are entitled to such treatment.

4. That likewise Appellant's life and liberty deserve the full and complete attention of his attorney and this is impossible at this time, so that, if this question is to be properly raised before the Supreme Court and it will be, Appellant's attorney will require the additional time to properly prepare and research the question.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that his Motion for an Extended Stay of the Mandate, pending application for a Writ of Certiorari to

the United States Supreme Court be granted for the reasons above stated.

Respectfully submitted,

s/ MORRIS BOGDANOW
Morris Bogdanow,
Attorney for Defendant,
3200 Kirby, Suite 204,
Houston, Texas 77006
521-0246

APPENDIX Q

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2829

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ARTHUR COLEMAN MILLS,
Defendant-Appellant

(Filed April 10, 1975)

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a further stay of the mandate of this Court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is further stayed to and including May 18, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a

copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

s/ JOHN WILLIAM WISDOM
United States Circuit Judge

Supreme Court, U. S.
FILED
JUL 14 1975
MICHAEL RODAK, JR., CLERK

No. 74-1431

In the Supreme Court of the United States

OCTOBER TERM, 1975

ARTHUR COLEMAN MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1431

ARTHUR COLEMAN MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a search warrant was executed improperly in violation of 18 U.S.C. 3109.[1]

Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed without opinion (Pet. App. K), and denied a petition for rehearing on March 4, 1975 (Pet. App. M). The petition for a writ of certiorari was not filed until May 14, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the petition.

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[1]18 U.S.C. 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

1. The evidence at trial[2] showed that on July 20, 1973, Dale Moorman told Daniel H. Weiderman, a Special Agent with the Drug Enforcement Administration (DEA), that petitioner was storing marijuana at a storage facility owned by Moorman's parents. Moorman had seen the marijuana there and had provided the Houston Police Department with a sample of the marijuana which was analyzed by the Department. (Tr. 19-21, 36-38). Agent Weiderman established a surveillance of the storage stall rented by petitioner, and on July 25, 1973, he observed petitioner at the stall (Tr. 40-41).[3]

The following day, July 26, Agent Weiderman approached the stall, observed two marijuana seeds by the door, and smelled the aroma of marijuana (Tr. 39). Thereupon, he obtained a search warrant from the magistrate and returned to the stall (Tr. 42-44). After waiting four or five hours for petitioner to appear at the stall, Agent Weiderman and other DEA agents decided to execute the warrant; they broke a padlock on the stall's door, entered and seized approximately 55 kilograms of marijuana (Tr. 44-46, 56). The next day a warrant was obtained for petitioner's arrest, and he was arrested at his home, approximately seven or eight miles from the stall (Tr. 49, 57-58).

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[2]A waiver of jury trial was filed, the case was tried before the court and, pursuant to the court's order, the motion to suppress evidence was "carried with the case and decided at the trial" (C.A. App. 5; Tr. 3).

[3]The storage stall rented to petitioner by Moorman's parents was a cinder block structure approximately ten feet by ten feet (Tr. 8, 53-54). It was one of 183 storage stalls owned by Moorman's parents and operated as Moorman's Self-Storage Warehouses (Tr. 5-6, 10-11).

2. Conceding the validity of the search warrant (Pet. 5) and acknowledging that there is no case law to support his position (Pet. 12), petitioner contends that the execution of the search warrant was improper because petitioner was not present at the time of its execution. He claims that 18 U.S.C. 3109 was violated when the agents obtained entry to the stall by breaking the padlock in petitioner's absence.

18 U.S.C. 3109 permits an officer to break into a residence and execute a search warrant after he gives notice of his authority and purpose and after he is refused admittance. However, this statute is applicable only to "a house, or any part of a house." It cannot be invoked by petitioner to challenge the forcible entry into a ten-foot square rented storage stall which was operated as part of a commercial enterprise. See note 3, *supra*.[4]

Moreover, neither 18 U.S.C. 3109 nor the Fourth Amendment requires that the occupant be present before a search pursuant to a valid search warrant may be conducted. *United States* v. *Gervato*, 474 F.2d 40 (C.A. 3), certiorari denied, 414 U.S. 864. Nor does Rule 41, Fed. R. Crim. P., provide, among its mandatory requirements, that a search warrant be executed only in the presence of the occupant. To the contrary, it provides that an inventory shall be made "in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, *if they are present* * * *." Rule 41(d), Fed. R. Crim. P. (emphasis supplied). See *United States* v. *Gervato, supra*, 474 F.2d at 43-44.

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[4]All of the cases upon which petitioner relies, save one, involved searches of either hotel rooms or apartments. See *Jack* v. *United States*, 387 F.2d 471, 473 (C.A. 9), certiorari denied, 392 U.S. 934; *Munoz* v. *United States*, 325 F.2d 23, 26 (C.A. 9); *United States* v. *Watson*, 307 F. Supp. 173, 174 (D. D.C.); *United States* v. *Sims*, 231 F. Supp. 251, 253 (D. Md.). While *United States* v. *Mullin*, 329 F.2d 295 (C.A. 4), involved a smokehouse, the smokehouse was located on a farm, only 75 feet from the defendant's residence, and constituted an "integral part of a group of structures making up the * * * home" (329 F.2d at 298). Thus, the *Mullin* case, too, is inapposite.

In sum, the breaking of the padlock to gain entry to petitioner's rented stall was reasonable in the circumstances and did not violate 18 U.S.C. 3109 or the Fourth Amendment merely because petitioner was not present.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.